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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, ET ALS.,

Appellants,

vs.

THE CITY OF TARRANT CITY, A MUNICIPAL CORPORATION, ET ALS.,

Appellees

APPEAL FROM THE SUPREME COURT OF ALABAMA

To the Honorable Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama:

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, the above named complainants and appellants file this their separate statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree of "Correction and affirmance" appealed from herein, as follows:

STATEMENT AS TO JURISDICTION

1. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344(a)), from a final judgment or decree of the

Supreme Court of Alabama entered October 16th, 1947, rehearing denied December 18th, 1947. The facts from which it arises may be briefly stated as follows:

On August 12, 1935, George D. Finley, Hattie Finley, Alta Finley and Frances Finley, appellants, filed their suit in the Equity Division of the Circuit Court of Jefferson County, Alabama, against The City of Tarrant City, a municipal corporation, and Z. D. McCuen, Clerk of said City, appellees, seeking, as pertinent to this appeal, the recovery or the reasonable value thereof of certain strips of land owned by appellants, which said City took without conveyance or condemnation proceedings to widen, enlarge or on which to form, Jackson Boulevard or street, Elm avenue, and an "alley"; damages for the "changing of the grade" of said Jackson street and of Elm avenue making it impracticable to get to or from said streets to the adjacent lands of appellants, in many places, such damages being a "taking" of said damaged property within the meaning of Section 1, Amendment 14, of the Constitution of the United States, which prohibits said City from depriving appellants of their property without due process of law; a declaratory judgment declaring said Ordinances Nos. 12, 38, and S-1, under which said lands were taken and said improvement assessments made were illegal and void within the meaning of Section 1, of the 14th Amendment to the Constitution of the United States, which prohibits the City of Tarrant City from adopting any Ordinance which deprives the appellants of their property without due process of law, or denies to them the equal protection of the law; a judgment or decree declaring that Ordinance No. 38, adopted in 1929 by said City, which provided for the improvement (including the grading thereof) of Jackson Street, and which provided that the costs thereof (including the grading) should be assessed against complain-

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ants and appellants property abutting thereon, impaired the contract said City made with Mrs. N. J. Finley, July 7th, 1924, whereby said City agreed, in consideration of a strip of land for a right of way for said Jackson Street, would improve and grade said street at said City's expense and without expense to said Mrs. N. J. Finley, or her heirs or assigns, as provided in said conveyance, said Ordinance No. 38, being repugnant to Section 10, Art. 1, of the Constitution of the United States which prohibits said City of Tarrant from passing any Ordinance impairing the obligation of said contract of July 7th, 1924, made with the mother and ancestor of appellants; a recovery of, or reasonable compensation therefor, of an easement or right of way, 30 feet wide and 877 feet long, forming now a part of Jackson Boulevard or street, which said right of way was acquired in 1916 by the predecessor of the Birmingham Electric Co., for a street car railroad in a condemnation proceeding against Mrs. N. J. Finley, mother and ancestor of appellants, which said easement or right of way was abandoned (and same reverted to the estate of appellants) when said Birmingham Electric Co., conveyed its title thereto to said City of Tarrant City for a street on Jackson Boulevard, said company reserving in said conveyance only 10 feet for a single track railway, and the right to place poles along said street—and in which conveyance said City agreed to and did remove said track of said railroad company, and grade and pave said right of way all but said 10 feet reserved, the costs and expense thereof, not being assessed against said Birmingham Electric Co., but was switched over and charged in and made a part of the assessments made against appellants,—said Ordinance, said assessments and conduct of said City being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, which prohibits said City of Tarrant

from depriving appellants of their property without due process of law; a specific performance of the contract entered into between said City and Mrs. N. J. Finley July 7th, 1924, whereby said City agreed, in consideration of a right of way 30 feet wide and 877 feet long, on Jackson Street, it would Grade said street (said grading being about 95% of the cost thereof of said improvement) at said City's expense and without expense to said Mrs. Finley or her heirs (said Grading it was agreed should be done by said City within a reasonable time, but which was Not done until 1929 when said City graded and paved said street and Then Charged All of the Cost Thereof) (including the Grading thereof) as a part of the assessments for said improvements against appellants, and specific performance being denied appellants so as to eliminate said cost of said Grading of said street, and require said City to comply with its said Contract of July 7, 1924, and pay itself for said GRADING said Ordinance and assessments thereunder and said conduct of said City, will deprive appellants out of their property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States; it was also shown in said suit that said streets had not been legally dedicated to the public, including said "alley", but that only a small portion of said property consisting of a few lots therein had been recorded as lots, the balance being in acreage.

The Protest, Objections and Defenses to said assessments (which was the first and only paper in the nature of a pleading provided by the statutes of Alabama to be filed) which was filed prior to September 23, 1930, with the Clerk of said Municipality, appellee, charged among other things, that said Ordinances and the assessments made thereunder were illegal and void, and repugnant to the Constitution of the United States. Said protest, objections and defenses

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were overruled, whereupon within 20 days thereafter, as provided by law, appellants perfected their appeals to the Circuit Court of Jefferson County, Alabama, in which they demanded a jury for the trial of same on appeal. It is further shown that said City Mayor approved said appeals and bonds; that they were never sent up to the Circuit Court, as provided for by law, and that nothing was done by said City until July-August 1935, After Mrs. N. J. Finley and her husband, Dr. W. M. Finley, father of appellants had both passed away. Then is when the City got busy and advertised said property for sale to satisfy said assessments, whereupon appellants Not being advised thereunto, except that they saw said advertisement in a local newspaper, they filed said suit August 12, 1935, to restrain and enjoin said City from selling said property Until Appellants Could Get A Trial On Their Appeals They Had Taken To The Circuit Court, in 1930. The case was passed from time to time by agreement of the attorneys for both sides, and some amendments were made (the law and rules of court in Alabama being very liberal in amendments, allowing an amendment any time before final decree).

In the original bill of complaint, and all of the amendments thereto, it was alleged that said Ordinances and assessments made thereunder were illegal and void, being repugnant to the Constitution of the United States; and the lands illegally taken by said City to form or widen or enlarge said Streets and "alley" belonged to appellants, and they were suing therefor, or the reasonable value thereof. In its ruling on the pleadings November 12th, 1946, the lower State court held that appellants were entitled to injunctive relief to prevent the sale of said property pending the hearing on said appeals theretofore taken in 1930 by appellants from said City to the Circuit Court,

but denied appellants all other relief, and dismissed said complaint as to all other relief except the injunctive relief.

The case was then appealed to the Supreme Court of Alabama, and it rendered a judgment or decree on October 16th, 1947, "Correcting and Affirming" said lower State court, in which said Supreme Court held that appellants were entitled to said injunctive relief, and also to recover for land illegally taken by said City to widen or enlarge Elm Avenue, but denied appellants all other relief. Application was then made by appellants for a rehearing, which said Supreme Court overruled on December 18th, 1947, at which time said cause or judgment therein became final.

2. State Statute (Ordinance) the Validity of Which Is Involved; and the Contracts Made by Said City With Mrs. N. J. Finley, and Also With Birmingham Electric Co., Pertinent Thereto.

There was thus drawn in question the validity of said Ordinances Nos. 12, 38, and S-1, under the Fourteenth Amendment to the Constitution of the United States, and also under the clause of Section 10, Article 1 of the Constitution of the United States. Said Ordinances, *except Ordinances* S-1, which the Clerk of said City and Counsel for appellants were unable to locate at City Hall of said City, are set out in full, attached hereto, and marked as follows:

(1) Ordinance No. 38, Exhibit A; (2) Ordinance No. 12, Exhibit B; said contracts are set out and made exhibits hereto as follows: (3) Contract of said City with Mrs. N. J. Finley, of July 7th, 1924, Exhibit C; (4) Contract by said City and Birmingham Electric Co., Exhibit D; a copy of the list of the assessments made (including the "Alley" assessed under Ordinance S-1, the sewer Ordinance, showing the strip of land illegally taken by said City to form said

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alley 15 feet wide and 366 feet long on appellants' property) Exhibit E; a copy of the Protest, Objections and Defenses to said assessments filed with the Clerk, Wallace Wells, of said City a few days prior to September 23rd, 1930, when same were made final, Exhibit F; a copy of the Affidavit of Wallace Wells, the then Clerk of said City, showing that said appeals were duly taken and approved by the then Mayor of said City, Exhibit G.

Date of Judgment or Decree: Finality Thereof: and Date of Appeal

The complaint of appellants in the lower state court contained several counts or paragraphs, in which various strips of land taken by said City to widen, enlarge, or on which to form streets or an alley, and other relief, were sought to be recovered. In its Decree "Correcting and Affirming" the decree of the lower court wherein said lower court held that appellants were entitled only to injunctive relief; said Supreme Court held that appellants were entitled to injunctive relief and Also the right to recover the land taken by said City to widen, enlarge, or form Elm Avenue, but denied appellants the right to recover lands taken in Jackson Boulevard, or the "Alley", and all other relief.

Said final decree of the Supreme Court of Alabama, unless reversed or modified, prevents appellants from recovering said strips of land in said other streets or the alley, and also other important relief sought by them in their said suit.

> "Where there are two or more counts in a declaration alleging distinctly different causes of action, there may be more than one final judgment on which writs of error may be taken, and the fact that such distinct judgments are contained in the same entry, and that one in favor of the plaintiff on one count has been satisfied, will not prevent his maintaining a writ of

error to review another in favor of defendant on different counts to which demurrers were sustained." *Washington v. Beeman,* 91 Fed. 232; *Collins* v. *Metro-Goldwyn Pictures Corp.,* 106 Fed. 2d 83; Note 48, Harv. L. Rev. 302, 304; *Comment,* 41 Mich. L. Rev. 535; *Moreno v. United States,* 120 Fed. 2d 128.

The final judgment or decree of the Supreme Court of Alabama plainly sustained the constitutionality of said Ordinances and assessments made thereunder, the taking of the strips of land (except Elm Avenue) of appellants, and the legality of the inclusion of the cost of removing the car track of the Birmingham Electric Co., and cost of grading and paving its said right of way to appellants, under the Fourteenth Amendment to the Constitution of the United States, and also under the 10th Section of Article 1, of the Constitution of the United States.

The said judgment of the Supreme Court of Alabama was rendered on October 16th, 1947, and rehearing denied December 18th, 1947. Petition for appeal to this Court was presented to the Honorable Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama, on the 11 day of March 1948, and was by him allowed on the 11 day of March, 1948.

Manner in Which Federal Questions Were Raised

The Federal questions were raised at the outset; first, in the Protest, Objections and Defenses filed in 1930 in the Office of the Clerk of said City (Tr. 55); then, in the Original Bill filed August 12th, 1935 (Tr. 5); then in the Substitute Bill filed in 1941 (Tr. 46, 47); then in the Amendment to Substitute Bill (Tr. 67, par. E; Tr. 68, par. F; Tr. 69, par. 1; Tr. 70, par. K; Tr. 71, Par. L; Tr. 70, par. N; Tr. 74, par. Q, 1, 2, 3), and also in the Assignments of Error filed on appeal from the lower state court. The Protest, the Plead-

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ings, and also the assignment of errors, each and all, alleged that said Ordinances were null and void because they deprived appellants of their property without due process of law and denied them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that Ordinance No. 38, impaired the obligation of the contract made July 7th, 1924 for the right of way said City acquired from Mrs. N. J. Finley, mother and ancestor of appellants, (Tr. 4, par. 7; Tr. 5, par. 12; Tr. 38, par. 3; Tr. 38, par. 2; Tr. 39, par. 4; Tr. 49, par. 6; Tr. 44, Par. 12; Tr. 44, par. 13; Tr. 45, par. 15, Secs. (b), (c), (d), (f), (i), (j), (m), (n); Tr. 66, par. D; Tr. 67, par. E; Tr. 68, par. F; Tr. 68, par G; Tr. 69, par. H; Tr. 69, par. I; Tr. 70, par. J; Tr. 71, par. L; Tr. 72, par. M; Tr. 72, par. N; Tr. 73, par. O; Tr. 74, par. P;) as being repugnant to the Constitution of the United States, Clause 10, or Article 1, and the Fourteenth Amendment, Sec. 1, of the Constitution of the United States. It was also clearly set forth in said pleadings by appellants that said Ordinances Nos. 12, and 38 and assessments thereunder on streets along or over which the street car line of the Birmingham Electric Co. operated in said City, were illegal in that said City did not comply with Section 2189 of the Code of Alabama for 1923-28 (Tit. 37, Sec. 528, Code, Ala., 1940) which requires Mandatorily that said City assess its proportionate cost of any improvements along such street car line right of way; that said City's said act in exempting said street car company from paying any of said improvement was ultra vires, illegal and void; and that in "shifting" onto appellants said improvement expense which the STATUTE OF ALABAMA required said Railroad Co. to pay, said City deprived appellants of their property without due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the United States, Sec. 1 of 14th Amendment, and Sec. 10 of

Art. 1, thereof. (Tr. 3, par. 6; Tr. 5, par. 12; Tr. 45, par. 15, sec. (d), Tr. 47, par. (j); Tr. 67, par. E; Tr. 74, par. Q. 2.).

The opinion of the Supreme Court of Alabama, a copy of which is appended to this Statement (Exhibit H) shows that the Federal questions were presented to, considered and decided by it:—(The opinion of the Supreme Court of Alabama has not yet been officially reported, but is unofficially reported in *Finley, et als.* v. *Tarrant City, et als.*, 32 So. 2d. 806, Advance Sheets of Southern Reporter, issued Jan. 15, 1948).——

Excerpts from the opinion of the Supreme Court of Alabama:

(Par. 3, page 807, 32 So. 2d. 807)—"The following is a brief summary of the allegations of the *substitute bill.* The complainants are the heirs at law of their mother, Mrs. N. J. Finley, who died in August 1932, and who owned the property involved in the suit. Mrs. N. J. Finley, on July 7th, 1924, deeded certain strips of land to be used as a street, in consideration of which the City agreed to relocate certain fences on her adjacent property, build a retaining wall to protect the adjacent property and GRADE the property adjoining the strips so deeded. Thereafter in 1930 the City did improve the street, but *contrary to its agreement it charged the grading and other unlawful expenses against the adjacent property*"—(a part of which)—"was platted into lots".—(Interpolation and emphasis supplied.) "The aforesaid strips of land, together with the land previously acquired from Mrs. Finley by the Birmingham Electric Company for a *right of way for street railway purposes* and *subsequently acquired by the City from that Company for street purposes,* became Jackson Boulevard"—Emphasis supplied.

Par. 6 of the Opinion: page 808: "It is alleged in the

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substitute bill that *Jackson Boulevard is not a public street but belongs to complainants*"—(Emphasis supplied).

Par. 15, page 809:—"The amendments to the substitute bill may be summarized as follows. Five paragraphs seek to recover possession of certain tracks of land from the City of Tarrant City. These tracts of land are portions of Elm Avenue, *Jackson Boulevard*, and *an alley.*"—"and *one paragraph* is for *the taking the lands without due process—lands now forming the alley or located in public streets* on which the lots abut. —It is claimed that the *strips of land on the sides of Jackson Boulevard were procured from Mrs. Finley by deed from her to the City but that provisions of the deed providing for relocation of certain fences, construction of a retaining wall and etc.*, (Note: the "etc" means the GRADING of Jackson Boulevard)—"were not complied with."—"It is claimed that a strip of land forming the center of Jackson Boulevard was acquired from Mrs. N. J. Finley by the Birmingham Electric Co., by *proceedings condemning the strip as a right of way* for STREET RAILWAY PURPOSES. It appears that on *August 22, 1929*, Birmingham Electric Co., *conveyed its right of way* to the City of Tarrant City for STREET OR HIGHWAY PURPOSES. It is *claimed* that since the Birmingham Electric Co., ABANDONED the right of way the title REVERTED to Mrs. Finley. In its deed to the City the Birmingham Electric Co., reserved the right to maintain and operate a street railway over the land"—(ONLY 10 feet, See Exhibit D, attached hereto) —"with necessary tracks, poles, etc."—(Interpolation and emphasis supplied).

Par. 17, page 809: "(1) *Upon careful consideration we have concluded* that this Court in its aforesaid opinion in *Ex parte Finley, et al. supra*, decided in principle much of what is here presented."—(*Ex parte Finley* is reported in 246 Ala. 218, 20 So. 2d. 98, was a MANDAMUS proceeding to

require the Judge of the lower state court to vacate its order sustaining objections of the City to answer certain interrogatories propounded to the City by appellants. The City had been *very reluctant* to make *any discovery* or *answer* any interrogatories in said case.—(Interpolation and emphasis supplied).

Par. 18, page 810: "We think that the allegations in *ejectment*, trespass, *breach of contract*, and for *specific performance*, sought to be set up and advanced in the Amendment to the substitute bill, *among other things*, are too far removed from the rights sought to be established in the substitute bill to admit of amendment."—"But there is a claim ORIGINALLY made an issue by the SUBSTITUTE BILL and its answer and set forth in *paragraph C of the amended bill*, with reference to the *land in Elm Avenue*, which should receive *our consideration*. It is the claim for taking the land in Elm Avenue *without just compensation*."—(Emphasis supplied).

Par. 19, Page 910: "• • • If the City took the property of Mrs. Finley to form part of Elm Avenue without compensation,—there is no suggestion that she gave a deed,—and such claim, if any, is not barred by laches, the statute of non-claim or the statute of limitations, then the court will grant relief in such respect by fixing just compensation therefor, with injunctive relief if necessary, because under those circumstances, the right to compensation persists. *Jones* v. *New Orleans and Selma R. R. Co.*, 70 Ala. 227; *Thornton* v. *Sheffield & B'ham R. Co.*, 84 Ala. 109, 4 So. 197; 5 Am. St. Rep. 337; *City of Birmingham* v. *Ala. Home Bld. & Loan Ass'n.*, 231 Ala. 558, 165 So. 817; *City of B'ham* v. *Smyer*, 230 Ala. 234; 160 So. 764."

Par. 20, page 810: "We see nothing in the case which should give the complainants any further right of amendment." (See copy of Opinion Supreme Court of Alabama,

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Exhibit H, hereto attached. Also a copy of the decree of the lower state court appears in Exhibits 1 and J, hereto attached).

The Federal Questions Involved Are Substantial

The ultimate Federal questions presented to the Supreme Court of Alabama were:

A. The validity under the Fourteenth Amendment to the Constitution of the United States of the Ordinances Nos. 12, 38 and S-1 and the assessments made thereunder, when the City had Not acquired *title from appellants* to the right of way for said Streets and Said Alley:

1. Whether said City in taking said lands to form, enlarge or widen said Jackson boulevard and the alley, without conveyance or condemnation proceedings, deprived appellants of their property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States, which prohibits said city from depriving appellants of their property, or from denying the appellants the equal protection of the law.

2. Whether said City in "changing the grade" of the streets—Elm and Jackson—making ingress and regress to appellants' adjacent lands impracticable in many places, was a depriving of appellants of their property in violation of the 14th Amendment to the Constitution of the United States.

3. Whether the agreement between said City and said Birmingham Electric Co. made in 1929, whereby said City agreed to remove the track of said company 2 ft. or more into the center of said Jackson Boulevard at the city's expense, and also to grade and improve and pave said right of way of said B'ham Electric Co., was illegal, null and

void, and untra vires, under Section 528, Tit. 37, Code of Ala., Section 2189 Code Ala., 1923-28); and whether or not the charging or including said COSTS OF SUCH REMOVING CAR TRACK, GRADING AND PAVING of said company's right of way and making same a part of the assessments made against appellants was a depriving of appellants of their property without due process of law under Section 1, of 14th Amendment to Constitution of the United States, and also denied to them the equal protection of the law.

B. Whether Ordinance No. 38, adopted by said City in 1929,—(AFTER the deed or agreement of JULY 7th, 1924, said City made with Mrs. N. J. Finley) IMPAIRED the contract of July 7th, 1924, wherein said City agreed to GRADE the said right of way on *Jackson Boulevard* at SAID CITY'S EXPENSE by violating Section 10 of Article 1, of the Constitution of the United States, which prohibits the City from passing any ORDINANCE *impairing the contract of appellants* made July 7, 1924. (See Exhibits A and B for Ordinances 38, and 12; See Exhibits C and D for the contracts made by the City with Mrs. Finley, and also with B'ham Electric Co.).

C. Whether the right of way acquired in 1916 by B'ham Electric Co. for STREET CAR RAILWAY USE ONLY, in a condemnation proceeding against Mrs. N. J. Finley, WAS ABANDONED in 1929 when said B'ham Electric Co. conveyed said right of way RESERVING ONLY TEN (10) FEET FOR A SINGLE TRACK railway, to said City, REVERTED TO THE ESTATE OF APPELLANTS and in NOT acquiring title thereto from said appellants, same was taken and is using same without due process of law, in violation of the 14th amendment to the Constitution of the United States, and/or that appellants are being thus denied the equal protection of the law.

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1. Whether the City acquired ANY TITLE to said right of way, or any portion thereof, to Jackson Boulevard, and if not, then said B'ham Electric Co. still owns said right of way, and under the statutes of Alabama is charged with the assessments and costs of grading, etc. Its said right of way; or, whether, if the City acquired some or any title whatever from said B'ham Electric Co., whatever portion of said right of way said City acquired title to, REVERTED to appellants and NOT having acquired title thereto from the appellants, said City is depriving appellants of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and in charging in and "shifting" said costs of grading and paving said right of way for said B'ham Electric Co., said ADDITIONAL BURDEN ON APPELLANTS TO PAY SAID COSTS, was a depriving of appellants of their said property, and a denial of the equal protection of the laws of appellants.

In sustaining the validity of said Ordinances and the assessments thereunder and the right of said City to take appellants property in the "*Alley*" and on *Jackson Boulevard,* and in allowing said City to damage said adjacent property of appellants in constructing and laying out and grading said streets—"changing the grade"—without compensation to appellants therefor, the Supreme Court of Alabama decided an important Federal Question in a way which conflicts with the Fourteenth Amendment, Section 1 of the Constitution of the United States, and of applicable decisions of this Court.—*Pamphelly* v. *Green Bay Co.,* 13 Wall. 166, 20 L. Ed. 557; *Gozzler* v. *Georgetown,* 6 Wheat. 593; *Chicago B. & Q. R. Co.* v. *City of Chicago,* 17 S. Ct. 581, 166 U. S. 266, 41 L. Ed. 979; *West* v. *Chesapeake, etc. Tel. Co.,* 55 S. Ct. 894, 295 U. S. 662, 79 L. Ed. 1640.

In holding that Ordinance No. 38 adopted by said City in 1929 did not impair the obligations of the contract made

by said City with Mrs. N. J. Finley in July 1924, the Supreme Court of Alabama decided an important Federal Question in a way that conflicts with Section 10 of Article 1, of the Constitution of the United States, and of applicable decisions of this Court.—*Ohio Life Ins. & Trust Co.* v. *Debatt,* 57 U. S. 416, 16 How. 416, 14 L. Ed. 997; *Gelpe* v. *City of Dubuque,* 68 U. S. 175, 1 Wall. 175, 17 L. Ed. 520; *Graham* v. *Folsom,* 26 S. Ct. 245, 200 U. S. 248, 50 L. Ed. 464; *Fletcher* v. *Peck,* 10 U. S. 87, 6 Cranch 87, 3 L. Ed. 162; *Trustees of Dartmouth College* v. *Woodward,* 17 U. S. 518, 4 Wheat. 518, 4 L. Ed. 629; *Houston & T. C. R. Co.* v. *State of Texas,* 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

In holding that the "changing of the grade" of said streets, and the damage thereby to appellants' property, did not amount to a taking of said property, and was not in violation of the 14th Amendment of the Constitution of the United States, the Supreme Court of Alabama decided an important Federal Question, which conflicts with the Fourteenth Amendment, Section 1 of the Constitution of the United States and of applicable decisions of this Court.—*U. S.* v. *Manufacturing Co.,* 112 U. S. 645, 5 S. Ct. Rep. 306; *Crane* v. *Hahlo,* 42 S. Ct. 214, 258 U. S. 142, 66 L. Ed. 514.

In holding that said City had the legal right to make an agreement with the Birmingham Electric Co., whereby said city REMOVED into the center of said street 2 feet or more of said track in Jackson Boulevard, and graded and paved said right of way for said B'ham Electric Co., without any cost or expense therefor to said B'ham Electric Co., was NOT ULTRA VIRES, and NOT in violation of the statute of Alabama which MANDATORILY HOLDS that such street railroads shall pay for such improvements; and in further holding that the "shifting" and including said BURDENSOME EXTRA COSTS AND EXPENSE WHICH SHOULD HAVE BEEN, UNDER THE LAW, PAID BY SAID RAILROAD COMPANY,—and making same

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a large portion of the assessments against appellants, did not deprive appellants of their property without due process of law, decided an important Federal question, which conflicts with said 14th Amendment, Section 1 of the Constitution of the United States, and of applicable decisions of this court.—*Choctaw O. & G. R. Co.* v. *Mackey*, 41 S. Ct. 582, 256 U. S. 531, 65 L. Ed. 1076; *Georgia Ry. & Electric Co.* v. *City of Decatur*, 56 S. Ct. 606, 297 U. S. 620, 80 L. Ed. 925; *Ill. Cent. R. Co.* v. *City of Decatur*, 13 S. Ct. 293, 147 U. S. 190, 37 L. Ed. 132; *Okla. Ry. Co.* v. *Severns Paving Co.*, 40 S. Ct. 73, 251 U. S. 104, 64 L. Ed. 168.

From the pleadings all the way through said suit, from the original bill (Tr. 1, par. 2) and the substitute bill (Tr. 38, par. 2) and the amendment to substitute bill (Tr. 71, 73) appellants claimed said land taken for said "ALLEY", and a PRAYER FOR GENERAL AS WELL AS SPECIAL RELIEF; said Ordinance S-1, taking said "alley" was adopted October 2, 1923; it was NOT 20 years from 1923 to 1935, when the Original Bill was filed, in which said "alley" was claimed; it was NOT 20 years from 1923 to 1941 when the SUBSTITUTE BILL WAS FILED, in which said "alley" was also claimed; it is, therefore, clear that said City never acquired said "alley" by prescription (which in Alabama requires 20 years public user, etc.,) and said City never acquired said "Alley" by deed or condemnation proceedings, and denying appellants their claim therefor is in violation of the 14th Amendment to the Constitution of the United States as claimed in said pleadings.

It MUST BE REMEMBERED that this case REALLY STARTED in 1930 before the Mayor and Councilmen of said City, when they made said assessments; and when the PROTEST was filed, attacking the CONSTITUTIONALITY under the United States Constitution the said ORDINANCES AND ASSESSMENTS (See Protest, Tr. 55); and when said assessments were appealed to

the CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA; but which were NEVER sent by said City and for that REASON it became necessary for appellants to file its original BILL in the Chancery Court of Jefferson County, to restrain said City from taking said property without due process of law. That after said Chancery Court acquired jurisdiction of the injunctive proceedings, it had jurisdiction of the case for ALL PURPOSES, even to the granting of pure LEGAL RELIEF. In par. 5 of the original bill, filed August 12, 1935, it was alleged (Tr. 3) that said City "damaged" said property by "changing the grades" of said streets, Jackson and Elm avenues; in par. 12 thereof, (Tr. 5) it was alleged that said City was attempting to "confiscate' said property; in par. 6 of the original bill (Tr. 3) it was alleged that the cost of improving the right of way for Birmingham Electric Co. was illegally charged to appellants; in par. 7 of original bill (Tr. 4) it was alleged that said City agreed in July 1924 to pay for said grading and improving said Jackson Boulevard in consideration of said 30 feet by 877 ft. strip of land for a street. In the SUBSTITUTE BILL (Tr. 38, par. 3), it was alleged that said Jackson Boulevard belonged to appellants, including the right of way abandoned by the Birmingham Electric Co. when it sold same to the City in 1929; also in said substitute bill (Tr. 46, par. 15,(d)) it was alleged that the "moving and grading" said car line right of way was illegally charged to appellants; also in par. (j) (Tr. 47) said Ordinances and assessments were alleged to be in contravention of the United States, the 5th and 14th amendments thereof; in par. (m) (Tr. 47) it was charged that said Ordinances and assessments IMPAIRED the contract made by said City with Mrs. N. J. Finley in July 1924; in the PROTEST (Tr. 55) which was made a part of said substitute bill, it was alleged, among other things, as follows: Par. 3: "For that said property was DAMAGED

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by said alleged improvements"; Par. 5: "For that under that certain deed of July 7, 1924, conveying the right of way to said City for a public street said City agreed to GRADE same, or improve same, at its own expense and without expense to said property"; Par. 6: "For that said laws and Ordinances under which said alleged improvements were done are ILLEGAL AND VOID"; Par. 7: "For that said alleged improvements and assessments were NOT done according to law"; Par. 8: "For that the moving of said street car line, and the assessments therefor was illegally charged to said property"; Par. 9: "For that said laws and Ordinances and assessments made thereunder violate the Constitution of Alabama, and also the Constitution of the United States." (Note: Under the law of Alabama only a GENERAL PROTEST is sufficient in such cases, as ruled by our Supreme Court).

IT MUST BE REMEMBERED that the deed of July 7th, 1924 to said street right of way was NOT even partly complied with by said City until 1930 when it improved said Jackson Boulevard; also that 20 years HAD NOT RUN BETWEEN July 7th, 1924, and September 23rd, 1930; nor had 20 years RUN between July 7, 1924 and August 12, 1935 when the ORIGINAL BILL was filed; nor had it run between July 7th, 1924 and June 14, 1941 when the SUBSTITUTE BILL WAS FILED, containing said PROTEST as a part thereof; NOR has said Jackson Boulevard been a PUBLIC WAY FOR 20 years even to THIS GOOD day of March 1948; and it will NOT HAVE BEEN USED AS A PUBLIC WAY until September 1949. It is also shown in said pleadings that said City after accepting said appeal bonds, held said appeals away FROM THE CIRCUIT COURT wherein a jury trial in each assessment was ordered, for five years, that is, until 1935, when the Original Bill was filed by appellants; and that said act of withholding said APPEALS away from being tried, was a depriving appellants of due process

of law, in violation of the Constitution of the United States, 14th Amendment; it was also shown or argued in said cause, that the City could not take advantage of its OWN WRONG,—hold out said appeals, then claim running of statute of limitations against appellants; to so allow such procedure would be to AID said City to deprive appellants of their property without due process of law, and aid said City to DENY appellants the equal protection of the law.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 237 (a) of the Judicial Code, as amended.

(S.) GEO. T. FINLEY, and
FRED G. MOORE,
Attorneys for appellants.

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EXHIBIT "A"

(Exhibit 5, Tr. p. 89)

THE FOLLOWING IS A COPY OF ORDINANCE NO. 38, WHICH PROVIDED FOR THE GRADING AND PAVING OF JACKSON STREET BY COMPLAINANTS'S PROPERTY IN TARRANT CITY, ALABAMA. ADOPTED SEPT. 3, 1929

Improvement Ordinance No. 38

"An Ordinance to provide for certain improvements on Jackson Street from the North-east property line of Park avenue (formerly Michigan Street) to the South-west property line of Sloan avenue.

BE IT ORDAINED, by the City Council of the City of Tarrant City, Alabama, as follows:

Section 1. That Jackson Street from the Northeast property line of Park avenue (formerly Michigan Street) to the Southwest property line of Sloan avenue shall be graded.

That the roadway for a width of 22 feet on each side of the center line of Jackson Street from the Northeast property line of Park avenue (formerly Michigan Street) to the Southwest property line of Thomason avenue shall be paved with one course Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick.

That the roadway between the gutter lines of Jackson Street from the Northeast property line of Thomason avenue to the Southwest property line of Sloan avenue shall be paved with one course Portland cement concrete pavement 7 inches thick.

That the roadway within the driveways of all intersecting streets or avenues between said points of improvement shall be paved with one course Portland cement concrete 7 inches thick with integral curb 6 inches thick.

Provided, however, that the area between the tracks and the rails of the tracks and for 29 inches outside of the outside rails of the tracks of the Birmingham Electric Company on Jackson Street between said points of im-

provements shall not be paved with concrete pavement but shall be macadamized.

That the sidewalk on the Northwest side of Jackson Street from the Northeast property line of Park avenue (formerly Michigan Street) to the Southwest property line of Thomason Avenue and the sidewalk on the Southeast side of Jackson Street from the east property line of alley running North and South through block 3, Sam Cargo's Second Addition, to the Southwest property line of Thomason Avenue shall be paved with Portland cement concrete sidewalk pavement 5 feet wide and

That stone headers shall be set in concrete across the roadways of all intersecting streets and avenues along the Northwest and Southeast property lines of Jackson Street, between said points of improvement.

That the entrances to lots along said avenue shall be paved for a width of 4 feet with Portland cement concrete sidewalk paving for the full width of the said walk and the driveways into lots and the alley-ways shall be paved with Portland cement concrete paving 6 inches thick for the full width of the sidewalk.

That vitrified clay or concrete drainage pipes, concrete drainage structures, inlets and manholes, of brick and castiron covers shall be constructed between said points of improvement.

Section 2. That said improvement shall be made in accordance with the established grades on file in the office of the City Clerk for said portions of said highway and according to full details, drawings, plans and specifications and surveys of said work and estimates, which shall be prepared by the engineer, as early as practicable, and placed by him on file in the office of the City Clerk, not later than two weeks prior to the date named in Section 4, of this Ordinance, where property owners who may be affected by said improvement may see and examine the same.

Section 3. That the cost of constructing said improvements shall be assessed against the property abutting on the portions of the highways so improved, provided:

(a) That the cost of improvements at or upon street, avenue or alley intersections, shall be assessed against

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the lots or parcels of land abutting on said highways so intersecting for one-half block in each direction.

(b) That the cost of sidewalk improvements on street and avenue corners shall be assessed against the lots or parcels of land abutting on or nearest to said improvements, and the cost of sidewalk improvements at the intersection of any alley with a street, avenue, or other highway shall be assessed against lots or parcels of land abutting or cornering on the alley at such intersection.

(c) That no assessment shall exceed the cost of such improvements or the increased value of said property by reason of the special benefits derived from such improvements.

Section 4. That the estimated cost of said improvements is $36,300.00 and that the City Council of the City of Tarrant City will meet on the 15th day of October 1929, in the Council chamber of the City Hall of Tarrant City at 7 P. M. o'clock to hear any objections, remonstrances or protests that may be made to said improvements, the manner of making the same or the character of materials to be used.

Section 5. That this Ordinance shall be published as required by law and notice by registered mail shall be given by the City Clerk to all property owners, as required by law.

READ, AND APPROVED, and ADOPTED this the 3rd day of September, 1929.

Approved: T. B. Self, Mayor."

(NOTE: It will be noted that the above Ordinance, No. 38, providing for the Grading—which amounted to about 90 per cent of the cost thereof—of said Jackson Boulevard, or street, was adopted by said City of Tarrant on September 3, 1929; and which also provided therein that the cost of the GRADING thereof, as well as all other expense of said improvements, shall be assessed against the "abutting lots or parcels of property"; said Ordinance clearly impairs the obligation of the contract made in July 7th, 1924, whereby said City acquired the right of way, or easement for said Jackson Boulevard through appellants' property,

and in which said contract or deed one of the main elements of the consideration agreed to be paid for said right of way, was that said City would GRADE said street at its expense and without any expense to the grantor. A copy of the deed or agreement conveying said right of way follows herewith for easy comparison.)

EXHIBIT "C"

Agreement or Deed of Conveyance from Mrs. N. J. Finley to the City of Tarrant City. (Dated July 7, 1924.)

(Exhibit "D", (Tr. p. 53)

"STATE OF ALABAMA,
JEFFERSON COUNTY:

THIS AGREEMENT made and entered into this the 7th day of July, 1924, by and between N. J. Finley and W. N. Finley, hereinafter called vendors and the Town of Tarrant City, Alabama, a municipal corporation, hereinafter called the Town,

WITNESSETH: The Town desires to secure for the purposes of a Public street the real estate hereinafter described and Vendors desire to assent thereto as hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and in further consideration of the matters hereinafter set forth, the said N. J. Finley and her husband, W. N. Finley, do hereby grant, bargain, sell and convey unto the said Town of Tarrant City, Alabama, to be used as a public street, two strips of real estate described as follows, namely:

A fifteen foot strip of land on each side of and adjoining the Birmingham Electric Company's right of way from the South line of Thomason avenue Southward approximately Eight Hundred Seventy-seven (877) FEET to the property line of Sam Cargo,—situated in Tarrant City, Jefferson County, Alabama; *said strips of land are to include sidewalks.*

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To Have and to Hold unto said Town, its successors, and assigns forever.

As a part of the consideration hereof, it is understood and agreed that the Town shall at its own expense, and without expense to Vendors remove the wire fence now standing upon said strips of land and place them along the property line, the posts for said fence to be oak or cedar, placed along said property line approximately eight feet apart with four strands of wire put upon them in such a manner as to make the same a substantial fence in its new position; and that while said fence is being removed from its present position to said property line, the Town shall see to it that the cattle in the enclosure provided by the present wire fence shall not be permitted to leave said enclosure but shall be kept within said enclosure by said Town during all the time said Town is engaged in the work of constructing said fence along said property line as aforesaid.

It is further understood and agreed that the Town shall construct at its own expense, and without expense to Vendors a retaining wall of cement along that portion of said property line on the East side of the right of way of the Birmingham Electric Company, and opposite to a certain spring located near Brannon Station and that said retaining wall shall be of sufficient height and length as will protect said spring from dirt and water coming from or over-flowing from said street.

It is further understood and agreed that the Town shall grade both sides of said strips of land within a reasonable time, making the same reasonably suitable for the use of the public as a street.

As a part of the consideration thereof, it is further understood and agreed that Vendors do hereby release the Town from all damages which may accrue by reason of the laying out and opening of said street.

In Witness Whereof Vendors have hereunto set their hands and seals and the said Town of Tarrant City, Alabama, has caused its name to be affixed hereto by the Mayor of said Town, the corporate seal of said Town to

be hereto affixed and the execution hereof by said Mayor attested by the Town Clerk on this the 7th day of July, 1924.

Mrs. N. J. Finley (L.S.)
W. N. Finley (L.S.)
Town of Tarrant City,
By G. W. Thomason,
Mayor.

Attest: S. H. Bowers.

EXHIBIT "G"

(Copy of Affidavit of Wallace Wells, former Clerk of Tarrant City, Ala.) (Exhibit B, Page 51 Tr.)

State of Alabama,
County of Jefferson:

Before me the undersigned authority in and for said County in said State, personally appeared Wallace Wells, who is known to me, and who after being duly sworn deposes and saith as follows:

My name is Wallace Wells. I reside in Tarrant City, Ala. and have resided there for several years. I was Town Clerk of the said City of Tarrant City during the tenure of office of Hon. T. B. Self as Mayor during the year 1930 and sometime prior thereto and until he went out of office. I am familiar with the papers that were filed into said office while I was Clerk of said Town, and I know of my own knowledge that all of the public Improvements for paving the streets and sidewalks along, by and through the real property owned by Mrs. N. J. Finley and her husband, Dr. W. M. Finley, both of whom are now deceased, and which said property is situated in the town of Tarrant City and which said paving assessments were in favor of said town of Tarrant City, were filed in my office for appeal to the Circuit Court of Jefferson County, Ala. by the said Mrs. N. J. Finley and her husband, Dr. W. M. Finley, and I know that the bonds for said appeals were approved

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by the Mayor at that time, Hon. T. B. Self. Said papers were properly filed and left in the office of said town of Tarrant City, Ala. and attention and notice that said papers (Appeals) were made known to the then City Attorney, Hon. N. A. Graham. After vacating said office I had no occasion to know of said appeals.

My best recollection is that there were 31 appeals and that an appeal bond was filed in each case.

(Signed) WALLACE WELLS.

Subscribed and sworn to before me this the 1st day of August, 1935.

(Signed) A. M. REEVES,
Notary Public.

EXHIBIT "B"

IMPROVEMENT ORDINANCE No. 12, (which provided for improvements on Elm Avenue, in Tarrant City)

(Exhibit 4, page 85 Tr.)

"An Ordinance to provide for certain improvements on First Ave. (or County Road) from the Southeast curb line of Pinson Street to the Northwest right of way line of the Birmingham Waterworks Canal.

BE IT ORDAINED by the Town Council of the Town of Tarrant City, Alabama, as follows:

Section 1: That First Avenue (or County Road) from the Southeast curb line of Pinson Street to the Northwest right of way line of the Birmingham Waterworks Canal shall be graded.

That the roadway, for a width of 15 feet on each side of the center line of First Avenue or (County Road) from the Southeast curb line of Pinson Street to a point 151.6 feet S. E. of S. E. property line of Pinson St. shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high; that the roadway, for a width of 11 feet on each side

of the center line of First Avenue or (County Road), from a point 290.8 feet Southeast of the SE property line of Pinson St. to a point 1079.7 feet Southeast of the SE property line of Pinson St. shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high; that the pavement on First Avenue or (County Road), from a point 151.6 feet SE of the SE property line of Pinson St. shall be connected with the pavement at a point 290.8 feet SE of the SE property line of Pinson St. with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high; that the roadway, for a width of 10.5 feet on each side of the center line of First Avenue or (County Road) from a point 1197.1 feet Southeast of the SE property line of Pinson St. to the Northwest right of way line of the Birmingham Waterworks Canal shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches and 7 inches high; that the pavement on said avenue or (Road) from a point 1079.7 feet SE of the SE property line of Pinson St. shall be connected with the pavement at a point 1197.1 feet SE of the SE property line of Pinson St. with Portland Cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high.

That the area within the intersection of the roadway of Pinson and Jackson Streets with First avenue or (County Road) shall be paved with Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick and 7 inches high.

1. That the sidewalks on both sides of First avenue or (County Road) from the SE property line of Pinson St. to the first alley SE of Pinson St. shall be paved from the property line to the curb lines with Portland cement concrete pavement 4 inches thick; that the sidewalks on both sides of First Avenue or (County Road) from the first alley SE of Pinson St. to a point 1097.7 feet SE of the SE property line of Pinson St. shall be paved for a width of 4 feet and a depth of 4 inches with Portland Cement concrete pavement; that the sidewalk on the west side of First Avenue from a point 1097.7 feet SE of the SE property

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line of Pinson St. to the Northwest right of WAY line of the Birmingham Waterworks Canal, shall be paved with Portland cement concrete pavement 4 feet wide and 4 inches thick.

That the alleyways between said points of said improvements shall be paved with Portland cement concrete pavement 7 inches thick and the driveways into lots shall be paved with Portland cement concrete pavement 6 inches thick.

That stone headers shall be set in in concrete across the roadway of Jackson St., along the Northeast and Southwest property lines of First avenue or (County Road) and across the roadway of First avenue or (County Road) along the Southwest right of way line of the Birmingham Waterworks Canal.

That vitrified clay or concrete drainage pipes, concrete drainage structures, inlets and manholes of brick with cast iron covers shall be constructed along said avenue or (road) between said points.

Section 2: That said improvement shall be made in accordance with the established grades on file in the office of the City Clerk for said portions of said highways, and according to full details, drawings, plans and specifications and surveys of said work and estimates, which shall be prepared by the engineer, as early as practicable, and placed by him on file in the office of the City Clerk, not later than two weeks prior to the date named in Section 4, of this Ordinance, where property owners who may be affected by said improvements may see and examine the same.

Section 3: That the cost of constructing said improvements less such amount as may be paid, or improvement constructed by Jefferson County, Alabama, shall be assessed against the property abutting on the portion of the highways so improved, provided:

(a) That the cost of improvements at or upon streets, avenues, or alley intersections, shall be assessed against the lots or parcels of land abutting on said highways so intersecting for one-half block in each direction.

(b) That the cost of side-walk improvements on street and avenue corners shall be assessed against the lots or parcels of land abutting on or nearest to said improvements, and the cost of side-walk improvements at the intersection of any alley with a street, avenue or other highway shall be assessed against lots or parcels of land abutting or cornering on the alley at such intersection.

(c) That the cost of improving between the tracks and rails of the tracks and for eighteen inches outside of the outside rails of the tracks, including switches and turnouts, of any steam, electric or other railroad tracks, shall be paved by the owners of such railroad and shall be assessed against and form a lien on such railroad and the property connected therewith, and a fair and just proportion of the cost of drainage improvements shall be assessed against and form a lien on each steam, electric or other railroad track on the highways or rights of way drained by such drains or sewers, and nothing shall be construed to relieve any such railroad of its obligations, in the matter of street improvements.

(d) That no assessment shall exceed the cost of such improvements or the increased value of said property by reason of the special benefits derived from such improvements.

Section 4: That the estimated cost of said improvements is $16,000.00 and that the Town Council of the Town of Tarrant City will meet on the 30th day of August, 1927, in the council chamber of the City Hall of Tarrant City at 7 o'clock P. M. to hear any objections, remonstrances or protests that may be made to said improvements, the manner of making the same or the character of material to be used.

Section 5: That this Ordinance must be published in a newspaper of general circulation, the date of the first publication must not be less than two weeks before the date set for the hearing of any objections, protests or remonstrances that may be made against said improvements, the manner of making the same or the character of material to be used. A copy of said Ordinance shall be also sent

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by registered mail, postage prepaid, to the persons last assessing for City or town taxation, and property which may be assessed for said improvements at their last known addresses, said notices to be so mailed by the Clerk of the Town of Tarrant City not less than twenty days before the meeting of the Town Council provided in the next preceding section.

READ AND APPROVED AND ADOPTED, this the 2nd day of August, 1927.

T. B. SELF,
Mayor.

A true copy:

WALLACE WELLS,
Clerk.

(NOTE: The improvement of Elm avenue under the above Ordinance 12, was done and the assessments made thereunder at the same time the improvements and assessments were made under Ordinance 38 on Jackson Boulevard,—that is 1929-30)

EXHIBIT "D"

(Copy of Deed: Birmingham Electric Co. to City of Tarrant)

CONVEYING ITS RIGHT OF WAY FOR STREET PURPOSES

(EXHIBIT 3, page 79 Tr.)

STATE OF ALABAMA,
JEFFERSON COUNTY:

Recorded Probate Office, Vol. 1956, Page 269

THIS AGREEMENT made and entered into on this the 22nd day of August, 1929, by and between the Birmingham Electric Co., party of the first part and the City of Tarrant City, Alabama, a municipal corporation, party of the second part,

WITNESSETH, THAT WHEREAS, the said Birmingham Electric Co. is the owner of an easement, or right of way for an

electric street railway, on, over, along and across the hereinafter described strip or parcel of land Thirty (30) feet wide and extending in length from the Westerly boundary line of Section 8 Tp. 17, R. 2 West, in a general Northeasterly direction to the Northeasterly boundary line of Sloan avenue at Jackson Street in the City of Tarrant City, in Jefferson County, Alabama; and whereas there has heretofore been dedicated for use for public highway or street purposes, two strips of land, one on either side of said right of way of the said Birmingham Electric Co., and adjacent thereto, each extending in length from the said Westerly boundary line of Section 8, Tp. 17, R. 2 West, in a generally Northeasterly direction to the Northeasterly boundary line of Sloan avenue at Jackson Street in said City; and whereas, the said City of Tarrant City desires to acquire the right to use for street or highway purposes said land Thirty (30) Feet in width, in, over, along and across which said Birmingham Electric Co. has an easement or right of way for an electric railway, so that said strip or parcel of land together with the said two strips of 15 feet each in width adjoining the same shall constitute one public street avenue, or highway 60 feet in width; and whereas, said Birmingham Electric Co. is willing to remise, release, quit-claim and convey to the said City of Tarrant City, for street or highway purposes all its right, title, interest and claim in and to said strip of land 30 feet in width hereinafter described other than an easement for the operation of its electric street railway which it desires expressly to reserve for the consideration and upon the terms and conditions hereinafter set forth;

And, whereas, the said City of Tarrant City is willing to enter into this agreement with the said Birmingham Electric Co. in consideration of such quit-claim and conveyance to it by said Birmingham Electric Co.,

Now, Therefore, in consideration of the premises and of one Dollar by each of the parties to the other in hand paid, receipt whereof is by each hereby acknowledged, and in further consideration of the mutual advantages to the respective parties hereto and of conditions and covenants

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hereinafter contained, the Birmingham Electric Co., a body corporate, agrees to remise, release, quit-claim and convey, and does hereby remise, release, quit-claim and convey unto the said City of Tarrant City, a municipal corporation, solely for use as a street or public highway, all its right, title, interest and claim in or to the following described parcel of land, situated in the City of Tarrant City, in Jefferson County, Alabama, viz.; a strip of land 30 feet in width, being 15 feet on each side of the following described line, to-wit: Beginning at a point on the Western boundary line of Section 8, Tp. 17, R. 2 West, 660.2 feet South of the Northwest corner of said Section, thence run North 42 deg., 13 min., East 7.2 feet; thence run 286 feet, more or less, on a 3 deg. 40 min. curve to the right to a point on the line which was formerly the boundary line between property owned by Tarrant Land Co. and R. B. Lacey in Section 8; thence continue on said 3 deg. 40 min. curve to the right 25 feet, more or less, to the end of said curve; thence run in a straight line 723.08 feet, more or less, to the North boundary line of said Section 8; thence continuing in a straight line 32.5 feet, more or less, to a line which was formerly the boundary line between the property of R. B. Lacey and the property of M. T. Branham, in Section 5, Tp. 17, R. 2 West; thence continue in a straight line 267.8 feet, more or less, to that line which was formerly the boundary line between the property of M. T. Branham and Nannie J. Finley, in said Section 5, Tp. 17, R. 2 West; thence continue in a straight line 645.3 feet; thence on a 2 deg. 52 min. curve to the left 231.4 feet, more or less, to a line which was the East boundary line of the property of said Nannie J. Finley and was formerly the boundary line between the property of the said Nannie J. Finley and the property of Tarrant Land Co.; thence on the same 2 deg. 52 min. curve 141.26 feet, more or less, to the end of the curve, thence in a straight line 318.55 feet, more or less, to the East property line of Sloan avenue in the center of Jackson Street said strip of land hereinabove described being all of that land acquired by the predecessor of

the grantor under and by virtue of the following deeds, namely, viz:

1. Deed from M. T. Branham and wife dated 9th March 1914, and recorded in Volume 797 page 589, in the office of the Probate Judge of Jefferson County, Ala.

2. Deed from R. B. Lacey and wife dated March 9th, 1914 and recorded in Record of Deeds, Vol. 797, page 590 of the aforesaid records.

3. Deed from Tarrant Land Co. dated March 12th, 1916, and recorded in Record of Deeds, Vol. 797, page 591, of the aforesaid records.

4. Deed from E. I. DeNemours Co. dated June 6th, 1918, and recorded in Record of Deeds Vol. 920, page 446.

5. A condemnation Proceeding against Nannie J. Finley and Sam Cargo as set forth in Probate Court Final Records Vol. 16, page 229.

It being the intention of the parties hereto that this conveyance shall and does hereby grant to the said City of Tarrant City all the right, title and interest of the Birmingham Electric Co. in and to that strip of land 30 feet wide used by the said Birmingham Electric Co. for a street railway right of way and extending from the Westerly line of Section 8, Tp. 17, R. 2 West, in a Northeasterly direction to the Northeasterly line of Sloan avenue at Jackson Street in the City of Tarrant City, in Jefferson County, Ala. except, however, and subject to rights reserved by and granted to said Birmingham Electric Co. its successors and assigns, hereinafter set forth;

To Have and to Hold, to the said City of Tarrant City and its successors, forever, solely and exclusively for street purposes reserving unto the Birmingham Electric Co., however, and to its successors and assigns, the perpetual right and easement to construct, maintain and operate a single track electric street railway with the necessary poles and appliances over, along, through and under the said strips of land and subject, however, to all of the rights reserved by and granted to said Birmingham Electric Co. and to the other terms and conditions as hereinafter set forth.

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First: Said Birmingham Electric Co. does, for itself and its successors and assigns, reserve and the said City of Tarrant City does hereby grant, bargain, sell and convey unto the said Birmingham Electric Co. the perpetual easement and right to construct, maintain and operate a single track electric railway in the center of said street, avenue or highway composed of said three strips or parcels of land hereinbefore described with all the necessary turnouts, sidetracks, passing tracks, poles, wires, appurtenances and necessaries for the construction, maintenance and operation of such electric street railway according to approved standards.

Second: That the said Birmingham Electric Co. does hereby reserve to itself, its successors and assigns, and the said City of Tarrant City does hereby grant, bargain, sell and convey to the said Birmingham Electric Co. the perpetual easement and right of erecting, constructing, maintaining and operating poles, wires, brackets, supports, guys, guards, appliances, machinery, devices and operation under, over, along and upon said street or highway and of transmitting, distributing, delivering and selling electric current for light and power purposes and for every other purpose, in, under, along, over or upon said street or highway and whether to consumers or prospective consumers residing within the corporate limits of the said City of Tarrant City or beyond and outside thereof. This reservation by the Birmingham Electric Co. and grant to it by the City of Tarrant City of the easement and right of erection, construction, maintaining and operating electric light and power lines is in addition to the rights, powers, privileges and franchises granted by the Town of Tarrant City to Lee C. Bradley as Receiver of Birmingham Railway Light and Power Company by Ordinance No. 14, adopted by the Town Council of the Town of Tarrant City on the 18th day of July 1921, and the contract entered into by and between the said Town of Tarrant City and the said Lee C. Bradley, as such Receiver pursuant to said Ordinance, and none of the rights, powers, privileges and franchises granted to the said Lee C. Bradley, as such Receiver thereof, to which rights, powers, privileges and fran-

chises the Birmingham Electric Co. has succeeded, or hereby waived or in any manner relinquished, released or impaired.

Third: That the Birmingham Electric Co. its successors and assigns, shall have and hold the rights, powers, privileges and franchises hereby reserved by it and granted to it by the said City of Tarrant City to itself, its successors and assigns forever.

Fourth: That upon request by the City Council of the City of Tarrant City said Birmingham Electric Co. will shift or move its street railway track from its present location to the center of said 60 feet street or highway where said tracks are not now in the center of said 60 foot street or highway, and will depress or elevate said track to the grade of said street or highway as established by Ordinance adopted by the City council of the said City, the cost of so shifting or moving said tracks and of elevating or depressing the same to be borne by the City of Tarrant City, and the said City of Tarrant City hereby agrees to pay such costs to said Birmingham Electric Co. upon rendition by said Birmingham Electric Co. to said City of Tarrant City of a statement of such costs and expenses.

Fifth: That in the event the said City of Tarrant City decides to improve said street or highway by paving the same or portions thereof, the center portion thereof, of the width of 10 feet, in the center of which shall be located the street railway tracks of the Birmingham Electric Co. and that portion thereof within the rails of said tracks where a side track, passing track or turnout is situated, and between such passing tracks and for 29 inches from the outside rail of each of said passing tracks shall not be paved but the pavement shall extend only to the sides of said 10 foot strip in the center of said street or highway, and in that part, or those parts, of said highway or street where a passing track, sidetrack or turnout is situated, only to a point within 29 inches of the outside rail of such passing track, sidetrack or turnout, and there and shall be constructed a concrete curb or wall along the edge of such pavement next to said unpaved strip in the center of said

street or highway, which curb or wall shall extend at least two inches above the surface of such pavement and unpaved strip in the center of said street or highway, which said strip shall be cherted or gravelled so that the surface thereof shall be of approximately the same grade or elevation as the surface of said portion of said street paved with cement concrete pavement or hard surfaced pavement and so that such unpaved strip in the center of said street or highway may be crossed without difficulty by automobiles and other vehicles provided that where said street or highway is crossed or intersected by other streets, avenues or highways the intersection of such street or highway with such other streets, avenues, or highways may be paved if the City so desires, with cement concrete or other hard surfaced paving; and on part of the cost of the cherting or gravelling or improving said ten feet strip in the center of said street, or improving or paving that remainder of said street or highway shall be taxed or assessed against the Birmingham Electric Co., or paid by it, except that where an intersection of said street or highway with some other street, avenues or highways is paved the cost of the pavement of that part of said intersection lying between the rails of said street railway track and for 18 inches on each side thereof, may be assessed against said Birmingham Electric Co. and will be paid by it.

In the event the Birmingham Electric Co. shall be required to pay the cost of improving or paving any portion of said street or highway, which under the terms of this agreement is not to be taxed or assessed against said Birmingham Electric Co., then and in that event the said City of Tarrant City will re-imburse the said Birmingham Electric Co. on demand for any such amounts which it shall have been required to pay.

Sixth: The Birmingham Electric Co. has released to the City of Tarrant City its right, title and interest in and to the right of way hereinabove described only upon the condition that if the land embraced within said right of way shall not be used or shall cease to be used as a public highway, then and in such event such right, title, interest or claim as the said Birmingham Electric Co. has in such right

of way prior to the execution of this instrument shall revert to and be again vested in the said Birmingham Electric Co., its successors and assigns.

Seventh: This agreement shall be binding upon and enure to the benefit of the successors and assigns of the parties as well as to the parties themselves.

In Witness Whereof the Birmingham Electric Co., a body corporate, has caused these presents to be executed for it and in its name and behalf by J. S. Pevear, its President, and to be attested and its corporate seal hereon affixed by J. P. Ross, its secretary, and the City of Tarrant City has caused these presents to be executed for it and in its name and behalf by T. B. Self, its Mayor, and to be attested and its corporate seal hereon affixed by Wallace Wells, its Clerk, each and all of whom are hereunto duly authorized, and done in duplicate and on the day and year first above written.

(Signed) Birmingham Electric Company,
By J. S. Pevear,
Its President.

Attest:
J. P. Ross, Sec. (Corp. Seal.)

City of Tarrant City,
By T. B. Self,
Mayor.

Attest:
Wallace Wells,
City Clerk.

Ack. Peaver, before Ethel Bilbrey, N. P.
Ack. T. B. Self, before W. Cooper Green, N. P.
Filed for Record: Dec. 4, 1929; Vol. 1956, page 269.

J. P. Stiles,
Judge of Probate.

(Note: The following is a copy of the written Protest filed by Mrs. N. J. Finley, objecting to said improvement assessments made under said Ordinances Nos. 38 and 12.)

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EXHIBIT "F"

Protest

To the Mayor and City Council of Tarrant City:

The undersigned, Mrs. N. J. Finley, being the owner of the following real estate, situated on Jackson Boulevard also on Elm avenue in the City of Tarrant City Ala., to wit: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of Mrs. N. J. Finley's First Addition to Tarrant City, and also the acreage known as the Finley pasture, bounded on the North by Elm avenue; on the West by the Alley next to G. W. Thomason Place; on the East by Jackson Boulevard; on the South by Cargo Property; also the Spring Lot intersection of Jackson Boulevard and Elm avenue; also the acreage bound on the South by Elm avenue, on the West by Jackson Boulevard; on the North by Thomason avenue, on the East by the Prosch property, files her objections and defenses to the assessments proposed to be levied by you for certain alleged improvements against said lots and parcels of land separately and severally and as grounds therefor sets down and assigns the following, separately and severally:

1. For that said assessments are excessive.

2. For that said assessments do not specially benefit said property to the extent of the amount of said assessment.

3. For that the said property was damaged by said alleged improvements.

4. For that many of said lots will have to be filled in with dirt before they can be used for building purposes.

5. For that under that certain deed of July 7, 1924, conveying the right of way to said City for a public street said City agreed to grade same, or to improve same, at its own expense, and without expense to said property.

6. For that said laws and Ordinances under which said alleged improvements were done are illegal and void.

7. For that said alleged improvements and assessments were not done according to law.

8. For that the moving of said street car line, and the assessments therefor was illegally charged to said property.

9. For that said laws and Ordinances and assessments made thereunder violate the Constitution of Alabama, and also the Constitution of the United States.

(Signed) Mrs. N. J. Finley,
By Geo. D. Finley,
Her agent and Attorney.

(Note: On, to wit: Sept. 23rd, 1930, the date set for the hearing the protests, etc., to said improvement assessments, the protest filed by Mrs. Finley was ignored and overruled. Thereafter within the time allowed by law, she filed 31 separate appeals and bonds, appealing said assessments against her property to the Circuit Court of Jefferson County, Ala. as provided for by law. The City attorney for Tarrant City at that time had agreed on the amount of each bond, and the Mayor of said Town of Tarrant City approved each of said appeals and bonds. About six months after taking and filing said appeals and bonds, Wallace Wells, the then Clerk of said City, wrote Mrs. Finley stating that said appeals had been filed, and wanting to know if she desired to pay them off, as he had only a short time to make transcripts of them and send same to the Circuit Court to be tried before a jury, a jury having been demanded in each of said appeals. No negotiations of settlement were made. The said appeals were never sent up to said Circuit Court, and a jury trial nor any other kind of trial was ever had on them. Mrs. N. J. Finley died in August 1932. Her husband, Dr. W. M. Finley, died in January 1935. In August 1935, several months after the death of the life-tenant, Dr. Finley, said City advertised said property for sale for said assessments. Seeing said advertisement in the newspaper, Geo. D. Finley, attorney, and heir or part owner of said property, together with the other parties complainants in this case, filed a suit in Equity to restrain and enjoin said City from selling said property until a trial on said appeals could be had. The City Had Made No Effort to Collect or Enforce the Collection

OF SAID ASSESSMENTS DURING THE LIFETIME OF MRS N. J. FINLEY, nor during the lifetime of Dr. W. M. Finley,—and only AFTER THE DEATH OF BOTH parents of complainants did said City make any gesture toward collecting same; and that about 5 years after said assessments were made.)

EXHIBIT "E"

(The following is a list and description of the property assessed, the amount thereof, etc. under Ordinances Nos. 12; 38 and S-1, Pro. 542 for Sewer in alley.) (page 50 Tr.)

Assessments under Ordinance No. 12

Pro. 16: Begin at intersection NW property line Finley St. with NE property line Elm avenue; thence NW along said property line Elm avenue 1 ft; thence NE and parallel with NW property line Finley St. 290. 5 ft. thence SE 1 ft. to said property line Finley St. thence SW along said property line Finley St. 290.5 ft. to point of beginning; Mrs. N. J. Finley's 1st Add'n, Estate of Mrs. N. F. Finley, $45.58.

Pro. 17: Lot 1, Mrs. N. J. Finley's 1st Add., Est. of Mrs. N. J. Finley, $306.05;

Pro. 18: Lot 2, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $254.92;

Pro. 19: Lot 3, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $306.84;

Pro. 21: Lot 5, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $15.79;

Pro. 22: Lot 6, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $15.79;

Pro. 23: Lot 7, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $13.46;

Pro. 24: Lot 22, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $7.09;

Pro. 25: Lot 21, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $11.09;

Pro. 26: Lot 20, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $7.09;

Pro. 27: Lot 19, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $3.09;

Pro. 28: —Begin at SW property line Elm avenue with NW property line of Jackson Blvd thence SW along said property line of Jackson Blvd 161.2 ft. thence NW and parallel with SW property line of Elm avenue to SW property line alley G. W. Thomason et als survey; thence NE along said alley line to SW property line of Elm avenue; thence SE along said property line Elm avenue to point of beginning in Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $2,953.79;

Pro. 29: Begin at SE property line of Jackson Blvd. with NE property line Elm Avenue; thence SE along said property line Jackson Blvd 297.2 Ft to N property line alley through Block 3 J. C. and W. N. Prosch survey; thence E along said alley line 351.5 ft. thence NW and parallel with Elm avenue to SE property line Jackson Blvd; thence SW along said property line Jackson Blvd. to point of beginning, in Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $1,647.91;

Pro. 30: Begin at intersection SE property line of Jackson Blvd with SW property line Elm avenue; thence SE along said property line Elm avenue 110.7 ft; thence S 82 deg. 42′ W 57.18 ft. to E. boundary Sam Cargo's 1st Add. thence N along said E boundary said Sam Cargo's 1st Add. to SE property line Jackson Blvd. thence NE along said property line Jackson Blvd. 16.1 ft. to point of beginning, in Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $573.35.

Assessments under Ordinance No. 38:

Pro. 82: Lot 9, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley $561.36;

Pro. 83: Lot 10, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $990.75;

Pro. 84: Lot 11, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $1,406.23;

Pro. 85: Lot 12, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $32.45;

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Pro. 86: Lot 13, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $27.93;

Pro. 87: —Begin at intersection of SE property line Jackson Blvd. with NE property line Elm avenue, thence SE along said NE property line of Elm avenue 150 ft; thence NE and parallel with SE property line of Jackson Blvd to SW property line of Thomason Ave., thence NW along SW property line of Thomason ave., to intersection with SE property line of Jackson Blvd 703 ft. to point of beginning; est. of Mrs. N. J. Finley, $7,717.09;

Pro. 74: Lot 1, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $5.71;

Pro. 75: Lot 2, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $11.10;

Pro. 76: Lot 3, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $1,586.50;

Pro. 78: Lot 5, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $539.62;

Pro. 79: Lot 6, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $539.62;

Pro. 80: Lot 7, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $554.43;

Pro. 81: Lot 8, Mrs. N. J. Finley's 1st Add. Est. of Mrs. N. J. Finley, $561.35;

Pro. 47: —Begin at the intersection of the SW property line of Elm avenue with NW property line of Jackson Blvd. thence SW along NW property line Jackson Blvd 161.2 ft; thence at right angles NW 140 ft; thence NE and parallel with Jackson Blvd to SW property line of Elm avenue; thence SE along SW property line of Elm avenue to point of beginning; est. of Mrs. N. J. Finley, $1,704.51.

Pro. 48: Begin at the intersection of SW property line Elm avenue with SE property line Jackson Blvd thence SW along SE property line Jackson Blvd 16.1 ft thence SE along NE boundary Lot "C" Sam Cargo 1st Add. 140 ft thence NE at right angles to SW property line of Elm avenue thence NW along SW property line Elm avenue to point of beginning; Est. of Mrs. N. J. Finley, $172.08;

Assessments under Ordinance 8-1, Pro: 542:

Begin at SE corner of Lot 6 of G. W. Thomason's survey; thence SE 15 ft to southside of alley for a point of beginning; thence SE along the west side of County Road to point parallel to alley south of G. W. Thomason's Survey; thence Southwesterly along said parallel line to E line of Sam Cargo's property; thence Northerly along said line to South line of Alley; thence Easterly along said alley to point of beginning; estate of N. J. and W. M. Finley, $377.52.

(NOTE: It will be noticed that only A PART of said property had been platted into lots; and if there had been any DEDICATION of any of it it would have been ONLY THAT PART or the abutting streets on that side of said streets where said lots were platted and designated as "LOT".

The acreage, CERTAINLY was NOT dedicated and the parts of said streets along by said acreage WAS NOT DEDICATED.

EXHIBIT "I"

IN THE CIRCUIT COURT TENTH JUDICIAL CIRCUIT OF ALABAMA, IN EQUITY

No. 39620

GEORGE D. FINLEY, ET ALS., *Complainants,*

vs.

THE CITY OF TARRANT CITY, a Municipal Corporation and Z. D. McCUEN, Clerk of Said Municipality, *Respondents*

Decree on Demurrer to Substitute Bill

THIS CAUSE, coming on to be heard is submitted upon demurrer of respondents to the substitute bill of complaint filed in this cause on the 14th day of June, 1941.

Many issues are sought to be raised by the aforesaid pleadings of complainants, which, in the opinion of the court, are not in this proceeding to be considered. How-

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ever, the court is of the opinion that a case of equitable cognizance is contained therein. A brief statement of such case being:

Complainants are sole heirs at law of one Mrs. N. J. Finley, who died in 1932. It is alleged that Mrs. Finley was the owner and in actual peaceable possession of the real estate subject matter of this suit, which is situated within the corporate limits of the City of Tarrant City; such ownership and possession having existed at the time of her death and for a long time prior thereto. Complainants, since the death of their predecessor in title, are claiming such ownership and the continued peaceable possession thereof.

In 1930 the respondent a municipal corporation, passed certain improvement ordinances and made certain improvements adjacent to or in the vicinity of the property herein involved. It is averred that after publication of notice by the municipal corporation as required by statute, Mrs. Finley duly filed, in writing, protests and defenses with the city Clerk, who through accident, fraud or negligence failed to present same to the city Council upon the hearing.

The assessments were made final against the property, and it is averred that Mrs. Finley duly presented appeal bonds for each separate and several assessment to the Mayor of the municipality as provided by Section 2204 et seq., Code of Alabama 1923, which said bonds were duly approved by that officer.

It is further averred that respondents have failed and refused to send the transcript of the proceeding to the Circuit Court, as provided by Section 2207 of the Code of Alabama 1923.

It is further averred that in 1935, that the municipality advertised the property for sale under and by virtue of the aforesaid assessment and proceeded to sell same; said municipality buying in said property.

The original bill of complaint in this cause was filed on August 12, 1935, and by fiat endorsed thereon the cause was set for hearing upon application for an order or writ, restraining and enjoining the respondent from selling, or offering for sale said property and for the cancellation of any sale that might have been made. This application for

temporary injunction or restraining order was denied by an order made August 14, 1935, by the Honorable Leigh M. Clark, one of the Circuit Judges of the Tenth Judicial Circuit of Alabama, sitting in equity.

The Court is of the opinion that the tendering of the protest or objections, by complainants' predecessor in title to the City Mayor, with the request of the filing thereof, was a sufficient compliance with law in regard to the filing of pleadings or other papers required or allowed by law to be filed;—*Covington Bros. Motor* v. *Robinson*, 194 So. 662; *Falley* v. *Falley*, 50 So. 894; *Phillips* v. *Bean's Admr.*, 38 Ala. 248.

Pretermitting a consideration of a question of filing vel non of the objections and defenses to the assessment, this court is of the opinion that upon the presentation to the Mayor of the municipality of the bonds for appeal and the approval by such officer such effectually removed the cause to the Circuit Court of Jefferson County, Alabama, and deprived the municipality of jurisdiction to entertain or to have further proceeding in regard to such assessment and left only the municipality or its officers the ministerial duty of sending a transcript thereof to the Clerk of the Circuit Court, as required by statute.—*City of Huntsville* v. *Pulley*, 65 So. 405.

The court is further of the opinion that the application for a temporary injunction or restraining order and the decree thereon above referred to, is not res adjudicata as to prevent further proceeding in this cause.

The court is further of the opinion that the grounds of demurrer raising laches are without merit for that the respondent, municipal corporation, cannot fail in its statutory duty in regard to forwarding the transcript to the Circuit Court after perfection of the appeal and then proceed to sell the property involved under its assessment.

It is therefore, Ordered, Adjudged and Decreed by the court that demurrer of respondent to the substitute bill of complaint be and the same is overruled.

Done and Ordered This the 10th day of December, 1941.

(Signed) E. M. Creel,
Circuit Judge, in Equity sitting.

EXHIBIT "G"

IN THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT OF ALABAMA, IN EQUITY

No. 39620

GEORGE D. FINLEY, et als., *Complainants,*

vs.

THE CITY OF TARRANT CITY, et als., *Respondents*

Decree on Demurrers to Amended Bill

THIS CAUSE coming on to be heard is submitted for a ruling upon demurrers of respondents to the Bill of Complaint as last amended. The Court having considered and understood the demurrers is of the opinion that they should be sustained except as to that aspect of the bill seeking injunctive relief.

It is therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the demurrers of respondents to the bill of complaint as last amended be and they are hereby sustained and said bill of complaint is hereby dismissed as to each and every aspect of said bill except that aspect seeking injunctive relief to which said aspect said demurrers are hereby overruled.

DONE and ORDERED THIS THE 12th day of November, 1946.

(Signed) E. M. CREEL,
Circuit Judge, in Equity sitting.

EXHIBIT "H"

THE SUPREME COURT OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA, OCTOBER TERM, 1947-48

6 Div. 529

Oct. 16, 1947.

GEORGE D. FINLEY, et als.

vs.

THE CITY OF TARRANT, a Municipal Corporation, et als.

Appeal from Jefferson Circuit Court, in Equity

STAKELY, JUSTICE:

This is an appeal from a decree of the equity court sustaining the demurrer to a bill of complaint, as amended, except as to that aspect of the bill seeking injunctive relief. The decree also dismissed the bill, except as to that aspect of the bill seeking injunctive relief. The original bill of complaint was filed in 1935 by George D. Finley and others (appellants) against The City of Tarrant, a municipal corporation, and Z. D. McCuen, the Clerk of the City of Tarrant (appellees). Among other things, the bill sought to restrain the city from selling certain real estate owned by complainants to satisfy certain improvement assessments thereon.

From time to time the bill was amended. In June, 1941, complainants filed a substitute bill. In December, 1941, the court rendered a decree on demurrer to the substitute bill, declaring that "many issues are sought to be raised by the aforesaid pleadings of complainants, which, in the opinion of the court, are not in this proceeding to be considered." The court, however, declared that "a case of equitable cognizance is contained therein", and overruled the demurrer. The aspect of the bill which the court considered as presenting a case for equitable relief is that part of the bill which seeks to enjoin the sale of the lots and preserve the lots in

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statu quo until the appeals hereinafter referred to, can be tried.

The following is a brief summary of the allegations of the substitute bill. The complainants are the heirs at law of their mother, Mrs. N. J. Finley, who died in August, 1932, and who owned the property involved in the suit. Mrs. N. J. Finley on July 7, 1924, deeded certain strips of land to the city for use as a street, in consideration of which the City agreed to relocate certain fencing on her adjacent property, build a retaining wall to protect the adjacent property and grade the property adjoining the strips so deeded. Thereafter, in 1930, the city did improve the street, but contrary to its agreement it charged the grading and other unlawful expenses against the adjacent property, which was platted into lots. The aforesaid strips of land, together with the land previously acquired from Mrs. Finley, by the Birmingham Electric Company for a right-of-way for street railway purposes and subsequently acquired by the city from that company for street purposes, became Jackson Boulevard.

Ordinance No. 12 provided for grading and paving of the street and laying of sidewalks on the street designated as Jackson Boulevard. Ordinance No. 38 provided for the same character of work on the street designated as Elm Street. Ordinance No. S-1 provided for the construction of certain sanitary sewers.

Assessments were made by the city against the lots adjoining the aforesaid streets and Mrs. N. J. Finley duly protested the assessments, filed her contest and appeal bonds and completed her appeals to the circuit court as provided by law. The city, disregarding these appeals, failed to send up the records to the circuit court as was its duty and some considerable time thereafter proceeded to advertise the lots for sale in satisfaction of the improvements liens.

It is alleged in the substitute bill that Jackson Boulevard is not a public street but belongs to complainants except that portion which was conveyed by Mrs. N. J. Finley to the Birmingham Electric Company for the right-of-way for its street car line many years prior to the doing of the work above

mentioned. It is further alleged in the substitute bill that complainants own twenty feet of the strip of land which the city has designated as Elm Avenue which the city took for the construction of the so-called improvement on Elm Avenue without the consent of Mrs. N. J. Finley and without just compensation.

The bill sought (1) to enjoin the sales and to have declared a discontinuance of the assessment cases because of the failure of the city to comply with its duty and send up the record of appeals, to the circuit court for trial; (2) a mandatory injunction directing the city to send up the record to the circuit court for trial as the law directs; (3) a cancellation of the assessments because of excessive charges imposed with the knowledge and the purpose so to do by the city officials, under a conspiracy to tax Mrs. Finley out of her property; (4) cancellation of the deed from Mrs. Finley to the city and its removal as a cloud upon the title to complainants's property; (5) a perpetual injunction against the city from collecting or attempting to collect the assessments and from securing or attempting to secure possession in any manner of the lots and parcels of land; (6) a prayer for general relief.

The demurrer to the substitute bill which was overruled was contained in the answer. There was no appeal from the ruling on the demurrer to the substitute bill. The answer denied, in substance, among other things, that the streets were not public ways, denied that any part of the same had been taken without consideration and alleged that claims for such, if any, were long barred by laches, the statute of non-claim and the statute of limitations.

On December 14, 1944, a phase of the case came before the Supreme Court of Alabama, which is reported as Ex Parte Finley, Et Als., 246 Ala. 218, 20 So. (2) 98. That case was an original petition of George D. Finley, et als., for mandamus to require E. M. Creel, as judge of the circuit court of Jefferson County, to vacate an order sustaining objections of respondents to answering interrogatories propounded by complainants in case pending in the circuit court of Jefferson County entitled George D. Finley, et als., v. City of Tarrant, et als., and directing the respondent

judge to enter an order requiring defendants to answer the interrogatories. In other words, the complainants in the case now before this court sought to require the city of Tarrant and L. D. McCuen, Clerk of the city of Tarrant, to answer certain interrogatories which the court had refused to require these respondents to answer. This court in denying mandamus in part said:

> "The phase of the bill, and only that, seeking injunctive relief against the foreclosure of the property by the city under the assessment liens pending trial of the appeals from the final assesssments presents a case for equitable cognizance. Injunctive relief will be accorded pending an action at law to preserve the status quo of the property until a final settlement of the rights involved. • • •
>
> "Nevertheless this according of equitable protection to the property pending such litigation is merely to preserve the property until the rights are settled at law and the equity court does not undertake to supplant the action at law or to settle such rights. • • •
>
> "The only relevance of the unanswered interrogatories pertains to that phase of the bill which seeks to declare the ordinance invalid and to vacate the assessments because of alleged improper conduct of the city officials. • • •
>
> "In our view, the sole equity of the bill is to prevent a sale of the property and preserve it and its possessions in status quo until the appeals can be tried, and injunctive relief for this purpose is proper."

After the aforesaid decision by this court the complainants filed an amendment to their substitute bill by adding a number of paragraphs with exhibits attached thereto. As stated, the court sustained the demurrer to the substitute bill as amended and dismissed the bill as to each and every aspect except the aspect seeking injunctive relief to which aspect the demurrers were overruled. The present appeal is from this last mentioned decree.

The amendments to the substitute bill may be summarized as follows. Five paragraphs seek to recover possession of

certain tracts of land from the city of Tarrant. These tracts of land are portions of Elm Avenue, Jackson Boulevard and an alley. Elm Avenue, Jackson Boulevard and the alley are public ways adjoining the lots owned by complainants on which the improvement assessments were made. Five paragraphs seek to recover damages for trespass for unlawful entry upon these lands by the city of Tarrant and one paragraph is for taking the lands without due process. In other words, the lands which are sought to be recovered or in connection with which damages in trespass are sought are not the lands which comprise the lots on which the improvement assessments were made, but are lands now forming the alley or located in public streets on which the lots abut. It is claimed that the lands which now form a part of Elm Avenue and which were taken from Mrs. Finley, were taken without being condemned and without just compensation. It is claimed that the strips of land on the side of Jackson Boulevard were procured from Mrs. Finley by a deed from her to the city but that the provisions of the deed providing for relocation of certain fences, construction of a retaining wall, etc., were not complied with. One paragraph seeks specific performance of the aforesaid provisions in the deed and one paragraph seeks to recover damages for breach of those provisions. The deed was made July 7, 1924. It is claimed that a strip of land forming the center of Jackson Boulevard was acquired from Mrs. N. J. Finley by the Birmingham Electric Company by proceedings condemning the strip as a right-of-way for street railway purposes. It appears that on August 22, 1929, Birmingham Electric Company conveyed its right of way to the city of Tarrant for street or highway purposes. It is claimed that since the Birmingham Electric Company abandoned the right-of-way the title reverted to Mrs. Finley. In its deed to the city of Tarrant the Birmingham Electric Company reserved the right to maintain and operate a street railway over the land with necessary tracks, poles, and so forth.

It is the earnest insistence of appellants that since the equity court assumed jurisdiction for injunctive relief, it should retain the bill for all purposes necessary to a com-

plete determination of all matters involved, though they be purely of a legal nature.

Upon careful consideration we have concluded that this court in its aforesaid opinion in *Ex Parte Finley, Et Als., supra,* decided in principal much of what is here presented. In that case this court held that the only equity of the bill was to prevent a sale of the lots and preserve them and their possession in *statu quo* until the appeals from the improvement assessments could be tried. Of course, that opinion should be considered in the light of the record then before the court, including the decree of the court on the demurrer to the substitute bill, with no appeal therefrom.

We think that the allegations in ejectment, trespass, breach of contract and for specific performance, sought to be set up and advanced in the amendment to the substitute bill, among other things, are too far removed from the rights sought to be established in the substitute bill to admit of the amendment.—*Ex parte Finley supra; Stamey* v. *Fortner,* 230 Ala. 204, 160 So. 116; *Henry* v. *Tennessee Live Stock Co.,* 164 Ala. 376, 50 So. 1029. But there is a claim originally made an issue by the substitute bill and its answer and set forth in paragraph C of the amended bill, with reference to the land in Elm Avenue, which should receive our consideration. It is the claim for taking the land in Elm Avenue without just compensation.

The court in its decree on the demurrer to the substitute bill, as amended, reaffirms the right to injunctive relief. If the city took the property of Mrs. Finley to form part of Elm Avenue without condemnation and the payment of just compensation—there is no suggestion that she gave a deed—and such claim, if any, is not barred by laches, the statute of nonclaim or the statute of limitations, then the court will grant relief in such respect by fixing just compensation therefor, with injunctive relief, if necessary, because under those circumstances, the right to compensation persists.—*Jones* v. *New Orleans & Selma R. R. Co.,* 70 Ala. 227; *Thornton* v. *Sheffield & Birmingham R. R. Co.,* 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337; *City of Birmingham* v. *Alabama Home Builders Ass'n,* 231 Ala. 558, 165 So.

817; *City of Birmingham* v. *Smyer*, 230 Ala. 234, 160 So. 764.

We see nothing in the case which should give the complainants any further right of amendment. The case has been before the court a long time.—*Alabama Lime & Stone Co.* v. *Adams*, 222 Ala. 538, 133 So. 580. Claims, which once might have been valid, have become stale from lapse of time as for instance any claim for compensation for land taken in the alley. It is alleged that this land was taken in 1923. Finally, there was no request for amendment before the dismissal.—*Ward* v. *Birmingham Water Works Co.*, 152 Ala. 285, 44 So. 570.

To sum up the situation in conclusion, there are two phases of the case which are not concluded. (1) The lots will be held in statu quo pending the appeals from the assessments thereon. (2) The court will determine the right, if any, to compensation and the amount thereof, if any, for the land in Elm Avenue alleged to have been taken without conveyance or condemnation. The decree of the court is accordingly corrected so as to show that the bill, as amended, is also retained as to this aspect.

Corrected and affirmed.

Gardner, C. J., Foster and Lawson, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

6 Div. No. 529

GEORGE D. FINLEY, et als., *Appellants*

vs.

THE CITY OF TARRANT etc., et als., *Appellees*

From Jefferson Circuit Court in Equity
The State of Alabama, City and County of Montgomery.

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to 9 inclusive, contain a full, true and correct

copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 16th day of October 1947.

(Signed) J. RENDER THOMAS,
Clerk of the Supreme Court of Alabama.

EXHIBIT "K"

STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA, OCTOBER TERM, 1944-45

6 Div. 272—

Ex parte: Geo. D. Finley, et als., Petitioners.

Petition for Mandamus Directed to Hon. E. M. Creel, as Judge, etc.

SIMPSON, JUSTICE:

Mandamus to review an order of the trial court declining to require answer to certain interrogatories propounded by petitioners (complainants) to the City of Tarrant (respondent), in a proceeding in equity at issue on bill and answer. Facts to be elicited by the interrogatories related to the costs and charges entering into certain municipal improvement assessments levied against the lots of appellants by respondent city. Certain of the interrogatories also sought to inquire into the motives of the city officials in adopting the improvement ordinance.

Only those interrogatories germane to the equities as disclosed by the bill are required to be answered.—*Altman* v. *Barrett*, 234 Ala. 234, 237, 174, So. 293.

A summary of the pertinent phases of the bill is: Mrs. Finley, appellants' mother (now deceased and from whom appellants inherited the property) deeded a certain strip of land to said city for use as a street, in consideration for which the city agreed to relocate certain fences on her ad-

jacent property, build a retaining wall to protect the lots where the street was to be constructed and grade the property adjoining the deeded strip. Thereafter the municipality did improve the street, but, (allegedly) contrary to its agreement, charged the grading and other unlawful expenses against the property. Appellants' mother duly protested the assessments, filed her contest and appeal bonds and completed her appeal to the circuit court as provided by law. The municipality disregarded these appeals, failed to send up the records to the circuit court, as was its duty, and some considerable time thereafter proceeded to advertise the property for sale in satisfaction of the improvement liens. The bill as last amended sought (alternatively) (1) to enjoin the sales and to have declared a discontinuance of the assessment cases because of the failure of the municipality to comply with its duty and send up the record of appeals to the circuit court for trial; (2) a mandatory injunction directing the city to send up the record of the appeals to the circuit court for trial as the law directs; (3) a cancellation of the assessments because of excessive charges imposed with the knowledge and the purpose so to do by the city officials, under a conspiracy to "tax Mrs. Finley out of her property," and; (4) a cancellation of the deed from Mrs. Finley to the city for failure of consideration.

The phase of the bill, and only that, seeking injunctive relief against the foreclosure of the property by the city under the assessment liens pending trial of the appeals from the final assessments presents a case for equitable cognizance. Injunctive relief will be accorded pending an action at law to preserve the status quo of the property until a final settlement of the rights involved (32 C. J. 124, § 162), to prevent irreparable injury.—32 C. J. 127, § 169; 32 C. J. 128, § 170; *Driver* v. *New*, 175 Ala. 655, 57 So. 437; *Mobile & Birmingham R. Co.* v. *L. & N. R. Co.*, 190 Ala. 417, 67 So. 244.

Nevertheless, this according to equitable protection to the property pending such litigation is merely to preserve the property until the rights are settled at law and the equity

court does not undertake to supplant the action at law or to settle such rights.—32 C. J. 124, § 162.

A prevailing exception to this last stated principle, that equity will not interfere to determine the rights of the litigants at law, is where there is a purely equitable defense unavailable at law precluding the law court from accomplishing complete and efficient justice.—*Boone* v. *Byrd*, 201 Ala. 562, 78 So. 958. The case here presented, however, is without this exception. The matters prayed for are either irremediable in any court or will be fully available as defenses when the appealed cases are tried in the circuit court.

The only relevancy of the unanswered interrogatories pertain to that phase of the bill which seeks to declare the ordinance invalid and to vacate the assessments because of alleged improper conduct of the city officials. The general rule, and controlling here, is that the courts will not institute an inquiry into the motives of the legislative department in determining the validity of ordinances enacted by them for local improvements.—*Cramton* v. *Montgomery*, 171 Ala. 478, 482, 55 So. 122; 32 A. L. R. 1524; 37 Am. Jur. p. 821, § 182. This is because, in making such law, the municipal council is exercising a legislative function and its authorized legislative acts are not subject to impeachment because of bad faith or improper motives.—*Cramton Case, supra; Albes* v. *So. Ry. Co.*, 164 Ala. 356, 365, 51 So. 327; *Clements* v. *Birmingham*, 215 Ala. 59, 61, 109 So. 158; *Talladega* v. *Jackson Lumber Co.*, 209 Ala. 106, 110 95 So. 455.

The rule is different when the city acts in an administrative or proprietary capacity, in which case its acts may be open to inquiry or impeachment for bad faith, fraud or improper motives.—*Pilcher* v. *City of Dothan*, 207 Ala. 421, 93 So. 16; *Van Antwerp* v. *Mobile*, 217 Ala. 201, 206 115 So. 239. This latter principle would be applicable to the present case if, in the execution and accomplishment of the purposes of the ordinance, the officials had so acted and included illegal and improper charges against Mrs. Finley's property in making the assessments. In such case, however,

the remedy at law is entirely adequate to redress the injury and afford relief.

Although not necessary to the present decision, it is observed that no case is made by the bill to authorize equity to cancel the deed of Mrs. Finley to the city for failure of consideration.—26 C. J. S. 195, § 21.

Nor will equity interfere with the cases at law to declare a discontinuance thereof because of the alleged failure of the clerk of the municipality to comply with the statute relative to the appeals from the final assessments. This defense likewise will be available when the cases come on for trial on appeal in the circuit court. The resolution of the municipal council making the assessments final is "a final judgment which can be reviewed only by an appeal seasonably taken therefrom in accordance with the provisions * * * of the Code * * *. A court of chancery can review such judgment only upon the exhibition of some distinct and recognized ground for equitable interference with judgments at law."—*Brock* v. *Decatur*, 185 Ala. 146, 148, 64 So. 73.

No such ground is specified in the bill. Equity is entirely unauthorized to undertake a cancellation of the assessments as for a discontinuance because of the failure of the city clerk to do his duty with respect to transmitting the transcript of the proceedings to the circuit court. Upon posting the appeal bonds and their approval by the proper officer (the statute regarding the presenting and filing of objections having been previously complied with) the appeal was effectively taken.—*Jacobs* v. *Goodwater*, 205 Ala. 112, 87 So. 363; *Lewis* v. *Martin*, 210 Ala. 401, 98 So. 635—And when taken the circuit court acquired jurisdiction of the whole matter, thereby divesting the municipality of further control thereof pending final disposition of said cases on appeal.—*Huntsville* v. *Pulley*, 187 Ala. 367, 65 So. 405; *Lewis* v. *Martin, supra; Cox* v. *Birmingham*, 21 Ala. App. 341, 108 So. 622, cert. den. by Sup. Ct.; *Larcher* v. *Scott*, 2 Ala. 40; *S. & N. Ala. R. Co.* v. *Pilgreen*, 62 Ala. 305; *Oklahoma Vinegar Co.* v. *Kaupp*, 136 Ala. 629, 33 So. 868; *Union Mut. Ins. Co.* v. *Robinson*, 216 Ala. 527(3), 113 So. 587; *Paterson Lumber Co.* v. *Ingersoll*, 226 Ala.

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347, 147 So. 140. And, as stated, the plea of the city's discontinuance of the causes is a defense the appellant may avail of in said circuit court upon due trial of the causes, not in equity as is here sought.

The rule of our cases has been that equity is available to challenge the validity of such proceedings for fundamental defects that go to the jurisdiction and render the proceedings void. We know of no case, and have been cited to none, where the principle has been further extended. Following are sustaining authorities.—*Birmingham* v. *Terrell*, 229 Ala. 523, 525, 58 So. 748; *Penton* v. *Brown*, 222 Ala. 155, 161, 131 So. 14; *Jasper Land Co.* v. *Jasper*, 220 Ala. 639, 127 So. 210; *Jasper* v. *Sanders*, 226 Ala. 84, 145 So. 827; *Bessemer* v. *Schanz*, 226 Ala. 573, 148 So. 131; *Walton* v. *Mobile*, 232 Ala. 200, 167 So. 247; *Rudolph* v. *Homewood*, 18 So. 2d 503; *Bessemer* v. *Ratliff*, 240 Ala. 406, 199 So. 838; *Chenault* v. *Russellville*, 233 Ala. 60, 169 So. 706; *Streater* v. *Town Creek*, 234 Ala. 132, 173 So. 853; *Cowan* v. *Florence*, 11 Fed. Sup. 973, 975.

In our view, the sole equity of the bill is to prevent a sale of the property and preserve it and its possession in status quo until the appeals can be tried, and injunctive relief for this purpose is proper.

So considered the case is not one for the issuance of the writ. The unanswered interrogatories relate to the phases of the bill which are without equity and the writ is therefore denied.

Writ denied.

All the Justices concur except Brown, J., who dissents.

Brown, Justice (Dissenting):

If, as alleged in the bill, the City of Birmingham acting through its city clerk through fraud, accident or mistake, without fault of the property-owner, failed to send up the appeals to the circuit court in 1930, when they were filed, the adverse party appealing in that case was denied due process of law, and the city should be enjoined from enforcing said ordinances from which the appeal is taken. This was the effect of the holding in *Jasper Land Co.* v. *City of Jasper*, 220 Ala. 639, 127 So. 210; *City of Bessemer* v.

Ratliff, 240 Ala. 406, 199 So. 838; *Rudulph* v. *City of Homewood et al.*, 245 Ala. 648, 18 So. 2d 563, and other cases.

Courts of equity in Alabama do not grant new trials nor do they supervise courts of law in the administration of justice. Where the jurisdiction of a court of equity is properly invoked, it does not presume to act on the law court itself, but only on the party, and makes its decrees effective by examining the case on the merits and settling the entire controversy according to equity and justice.—*Norwood* v. *Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683.

It is a familiar principle, well settled in Alabama, that when a court of equity takes jurisdiction for one purpose, it will settle the whole controversy. If the complainants are entitled to relief at all they are entitled to have that relief granted by the circuit court in equity. It is on this ground I differ with my brethren and dissent from the holding in the foregoing opinion.—*Evans* v. *Wilhite*, 176 Ala. 287, 58 So. 262.